Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

JOSEPH F. LAFFEY, Petitioner, vs. JOHN F. AULT, Warden, Respondent.	No. C04-1004-MWB **MEMORANDUM OPINION AND ORDER ON MAGISTRATE'S REPORT AND RECOMMENDATION ON MOTION TO DISMISS**

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I. INTRODUCTION AND BACKGROUND

In 1997, petitioner Joseph F. Laffey ("Laffey") was tried by jury, and convicted, of two counts of second-degree sexual abuse with children under the age of twelve under Iowa Code sections 709.1(3) and 709.3(2). Following his conviction, Laffey was sentenced to two consecutive 25-year terms of imprisonment by Iowa District Court Judge David J. Sohr. Laffey filed a direct appeal, challenging both his conviction, and the sentence imposed, on the following four grounds: (1) there was not substantial evidence to support his conviction on either count; (2) ineffective assistance of counsel based on trial counsel's failure to object to several courtroom procedures;(3) imposition of two consecutive 25-year sentences constituted cruel and unusual punishment in violation of the Eighth Amendment; and (4) the trial court abused its discretion in considering an impermissible sentencing factor in imposing sentence. In *State v. Laffey*, 600 N.W.2d 57 (Iowa 1999) ("*Laffey I*"), the Iowa Supreme Court found sufficient evidence to support the convictions, preserved Laffey's claims of ineffective assistance of counsel for a later postconviction relief action, found that Laffey's consecutive sentences did "not give rise to an inference of gross disproportionality" in violation of the Eighth Amendment, and held the trial court committed an abuse of discretion in improperly considering the difficulty in explaining the rationale of concurrent and consecutive sentences to the young victims in imposing sentence. *Id.* at 57-62. Ultimately, the Iowa Supreme Court affirmed the conviction, but vacated and remanded the matter for resentencing. *Id.* at 62. On May 9, 2000, Laffey was resentenced by Iowa District Court Judge James E. Kelley. Ultimately the court again imposed two consecutive 25-year sentences after considering appropriate sentencing factors. Laffey again appealed these sentences, claiming that the court had abused its discretion in giving him consecutive sentences "because the facts and circumstances of the occurrence as well as his own character and potential for

rehabilitation [did] not reasonably support a sentence that may imprison him for the rest of his life." *State v. Laffey*, 2001 WL 194873 at *1 (Iowa Feb. 28, 2001) ("*Laffey II*"). The Iowa Court of Appeals found that the sentencing court had not abused its discretion, and affirmed the consecutive sentences imposed at resentencing. *Id.* at *3. On May 29, 2001, procedendo issued. *See State v. Laffey*, No. FECR003529 (Jackson County Dist. Ct. 2001).

On July 7, 2002, Laffey filed an application for post-conviction relief with the Iowa District Court In and For Jackson County, which was later dismissed at Laffey's request on January 23, 2003. *See Laffey v. State*, No. PCCV025042 (Jackson County Dist. Ct. 2003).

On January 15, 2004, Laffey filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging the legality of his conviction and resulting confinement on two grounds: (1) the testimony of the two victims was so "inconsistent, improbable and incredible that a rational fact finder could not find proof of guilt" under federal due process standards; and (2) the imposition of consecutive sentences under the facts of the case constituted a violation of Laffey's constitutional right against cruel and unusual punishment grounded in the Eighth Amendment. (Doc. No. 1). On March 4, 2004, this court filed an initial review order dismissing the petition as barred by the applicable statute of limitations. (Doc. Nos. 2 & 3). Laffey filed a Motion to Reinstate Action on March 9, 2004, asserting that his petition was timely filed and requesting the court's March 4, 2004, Order be vacated (Doc. No. 4). On March 12, 2004, this court filed an order vacating the March 4, 2004, Order, but concluded that Laffey had not exhausted his claim for cruel and unusual punishment under the Eighth Amendment as Laffey had failed to raise it in the appeal of his resentencing—therefore, the petition was mixed and should be dismissed. (Doc. No. 7). On March 22, 2004, Laffey filed a Motion to Vacate or Modify Order of

March 12, 2004, in which he asserted that the exhaustion requirement as to his Eighth Amendment claim had been met as the issue had been raised in one full round of the state appellate process, and prayed that the court reinstate the claim, or in the alternative dismiss only the Eighth Amendment claim as unexhausted and allow the remaining claim to proceed. (Doc. No. 9). Laffey additionally filed a Motion to Amend Petition on March 22, 2004. (Doc. No. 12). This court granted both of Laffey's motions in an order dated April 1, 2004, and directed respondent John F. Ault ("Ault" or "the State") to file an answer. (Doc. No. 14). Ault filed an answer on May 20, 2004, (Doc. No. 16), and a Motion to Dismiss the petition on May 21, 2004. (Doc. No. 17). Generally, Ault argued for dismissal on grounds that the petition was a "mixed" petition of exhausted and unexhausted claims—claiming that the Eighth Amendment claim was the unexhausted claim. Laffey resisted the motion on June 7, 2004, asserting that the claim was exhausted—and, alternatively requesting that if the court found the claim unexhausted, that only the Eighth Amendment claim be dismissed and he be allowed to proceed with the exhausted claim. (Doc. No. 19). On June 9, 2004, Ault filed a reply brief. (Doc. No. 20).

The motion to dismiss was referred to United States Magistrate Judge Paul A. Zoss pursuant to 28 U.S.C. § 636(b)(1)(B). On February 9, 2005, Judge Zoss filed his Report and Recommendation, which recommended that Ault's motion to dismiss be denied. (Doc. No. 22). On February 17, 2005, Ault filed his objections to the Report and Recommendation—essentially taking issue with Judge Zoss's analysis in its entirety. (Doc. No. 31). The matter is now fully submitted and the court will now undertake the necessary review of Judge Zoss's Report and Recommendation.

II. LEGAL ANALYSIS

A. Standard Of Review

Pursuant to statute, this court's standard of review for a magistrate judge's report and recommendation is as follows:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's report and recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). Because objections have been filed in this case to Judge Zoss's legal conclusions, the court must

conduct a *de novo* review. With these standards in mind the court will now turn to Judge Zoss's analysis of the motion to dismiss, followed by Ault's objections to Judge Zoss's Report and Recommendation, and finally to this court's *de novo* analysis of the issues presented.

B. The Report And Recommendation

In his Report and Recommendation, Judge Zoss employed the following analysis in determining that Laffey's Eighth Amendment claim was properly exhausted, and that Ault's motion to dismiss should be denied:

> The United States Supreme Court, in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999), held:
>
> > Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.
>
> *Id.*, 526 U.S. at 842-43, 119 S. Ct. at 1731 (citations omitted). Similarly, subsection 2254(c), 28 U.S.C. § 2254(c), provides:
>
> > An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
>
> Iowa law provides for direct appeal of a criminal conviction as a matter of right. Iowa Code§ 814.6(1)(a) (1983). A direct appeal must be filed within thirty days from the final judgment. Rule 101, Iowa Rules of Appellate

Procedure.

After his trial and sentencing, Laffey timely filed a direct appeal, raising both of the issues he is asserting in this action. The Iowa Supreme Court ruled against him on these issues. However, after he was resentenced following remand to the state district court, he did not reassert his Eight (sic) Amendment argument in his second direct appeal to the Iowa Supreme Court. In its motion to dismiss, the State argues that Laffey, therefore, has failed to exhaust his state remedies on this issue.

Laffey disagrees. He argues his second sentence was not a "new" sentence at all, but instead he was sentenced to the same term of imprisonment as before. He argues the only difference was the sentencing judge did not consider the sentencing factor which the Iowa Supreme Court found to be improper, to-wit: "the difficulty that might be experienced in explaining the rationale of concurrent versus consecutive sentencing to young victims[.]" *Laffey I*, 600 N.W.2d at 62. Laffey argues he received "the same sentence, imposed on the same facts, from the same trial, in the same criminal action on the same case number in the same state district court." (Doc. No. 19, ¶ 7)

Laffey argues further that he offered the Iowa courts a full opportunity to rule upon his Eighth Amendment claim in the context of his first appeal, and he consciously did not raise the issue again in his second appeal because he believed the issue "had already been determined, and the first appellate decision was law of the case." (*Id.*, ¶ 10) He argues the cases cited by the State all involved petitioners' attempts to raise a federal question for the first time in federal court, without providing the state courts with an opportunity to rule on the issue themselves. (*Id.*, ¶ 8)

The parties argue at some length about whether the Iowa Supreme Court's discussion of Laffey's Eighth Amendment issue was, or was not, dicta. Whether deemed to be dicta or not, the undersigned finds the Iowa Supreme Court fully discussed the issue in *Laffey I*. As such, it appears

> raising the identical issue again on appeal after resentencing would have been futile. The Eighth Circuit Court of Appeals has held this type of futility may constitute a defense to the rule requiring the exhaustion of state remedies. *See Hawkins v. Higgins*, 898 F.2d 1365 (1990) (citing *Piercy v. Black*, 801 F.2d 1075, 1077 (8th Cir. 1986) for the proposition that "a decision on the same question of law, under almost identical facts, made state court remedies futile"); *accord Padavich v. Thalacker*, 162 F.3d 521, 522 (1998) ("We have recognized the futility of requiring a habeas petitioner to exhaust state remedies when the state court has recently decided the same legal question adversely to the petitioner under nearly identical facts.") (citing *Hawkins* and *Piercy*).
>
> As the *Padvich* court noted, the "exhaustion rule is not a rule of jurisdiction, and sometimes the interests of comity and federalism are better served by addressing the merits." *Id.* (internal quotation marks omitted). The undersigned find (sic) that course of action is appropriate here, and therefore recommends the petitioner's Eighth Amendment argument be addressed on its merits after full briefing by the parties.

Report and Recommendation on Motion to Dismiss, Doc. No. 22, at 4-6 (footnote omitted) ("Report and Recommendation").

C. Ault's Objections

Ault lodges a voluminous set of objections which rejects Judge Zoss's analysis, and resulting conclusion, in its entirety: "the Respondent respectfully submits that under the particular facts in this case a futility analysis [is] inapplicable, that an analysis applying the futility doctrine is itself fundamentally flawed in light of the more recent decisions of the United States Supreme Court and the AEDPA amendments, and that the Magistrate's ultimate conclusion is incorrect." Respondent's Objections to Magistrate's Report and Recommendation on Respondent's Motion to Dismiss, Doc. No. 31, at 5 ("Objections").

Ault breaks down his objections into four parts—each of which the court will set forth in turn.

Ault first attacks Judge Zoss's citation to Iowa Code § 814.6(1)(a) as supporting the statement that "Iowa law provides for direct appeal of a criminal conviction as a matter of right"—claiming that section 814.6(1)(a) focuses not on the conviction, but rather, specifically on the sentence arising from the conviction and grants a defendant the right to appeal that resulting sentence. Ault additionally asserts that, upon resentencing, Laffey received exactly what the Iowa Supreme Court dictated he should receive in *Laffey I*—a completely *new* sentence. Therefore, any claims that Laffey had as to his new sentence needed to be raised on direct appeal—and the Eighth Amendment claim was not so raised.

Second, Ault takes issue with Judge Zoss's failure to acknowledge that *Laffey I*'s discussion of the Eighth Amendment claim was merely dicta—specifically, Ault takes issue with the following language: "Whether deemed to be dicta or not, the undersigned finds the Iowa Supreme Court fully discussed the issue in *Laffey I*." Report and Recommendation at 5. Ault contends that the Iowa Supreme Court's discussion of Laffey's Eighth Amendment claim did not form any basis for the ultimate decision to vacate the sentences and remand for resentencing, and was therefore dicta. Further, Ault contends that once Laffey's original sentences had been vacated they ceased to exist—as if they never had been imposed in the first place. Ault argues, therefore, that as the Iowa Supreme Court discussed the Eighth Amendment argument in the same breath as it vacated Laffey's original sentences on other grounds, any discussion of the Eighth Amendment does *not serve as the law of the case*.

Third, Ault contends that by focusing on "the issue" (i.e. the Eighth Amendment claim asserted in the petition), rather than on the fact that the sentences on remand were procedurally new sentences from the original sentences that were vacated, the Report and

Recommendation loses sight of the issue at hand—whether the Eighth Amendment claim as to the *new* sentences following remand had been exhausted. Ault points to the following statement in the Report and Recommendation as demonstrating this loss of focus: "raising the identical issue again on appeal after resentencing would have been futile." Report and Recommendation at 5. Ault urges that "the remote possibility of success should not be allowed to translate into application of the 'futility doctrine' to excuse proper exhaustion of claims on appeal and in State postconviction actions." Objections at 13. Ault further objects to the application of the futility doctrine in this instance as it characterizes the Iowa state court's judicial processes as futile. Ultimately, Ault argues that an Eighth Amendment challenge following resentencing would not have been the "identical issue" because at resentencing Laffey received *new* sentences to which no such challenge had yet been made. Ault contends that "[a]llowing [Laffey] to avoid exhaustion by invoking the futility doctrine allows an otherwise defaulted claim to proceed with no showing of cause or prejudice." *Id.* at 14. Ault additionally contends that at this time, Iowa courts would consider any Eighth Amendment claim as to the new sentences imposed following remand to be waived—which translates, in this § 2254 proceeding, into the Eighth Amendment claim being procedurally defaulted.

Finally, Ault objects to the application of the futility doctrine in this case as against decisions of the United States Supreme Court—specifically claiming that the Supreme Court has made it clear that futility is not an excuse for failing to exhaust a claim. Objections at 20 (quoting *Engle v. Isaac*, 456 U.S. 107, 130, 102 S. Ct. 1558, 1573, 71 L. Ed. 2d 783 (1982)). Ault first takes issue with the case law Judge Zoss employed in supporting his determination that reasserting the Eighth Amendment claim on appeal following resentencing would have been futile. Ault claims two cases cited in the Report and Recommendation's analysis—*Hawkins v. Higgins*, 898 F.2d 1365, 1366 (8th Cir.

1990) and *Piercy v. Black*, 801 F.2d 1075, 1077 (8th Cir. 1986)—pre-date the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which affirmatively prevents bypassing the state courts unless the state itself expressly waives such exhaustion. *Id.* at 21-22. Ault additionally asserts that a third case cited by the Report and Recommendation, *Padavich v. Thalacker*, 162 F.3d 521, 522 (8th Cir. 1998), does not support the continued viability of either *Hawkins* or *Piercy*, but rather leaves for "another day" the issue of the viability of the futility doctrine while acknowledging that new provisions of the AEDPA allow federal courts to address unexhausted claims only for the purposes of denying those claims, not for the purposes of granting them. Therefore, according to Ault, the cases cited by Judge Zoss provide that statutory authority exists, at most, to deny an unexhausted claim on the merits. In conclusion, Ault contends that futility should not be a basis for denying the motion to dismiss Laffey's clearly unexhausted Eighth Amendment claim.

D. The Law—Exhaustion Of State Remedies

The federal habeas statute, 28 U.S.C. § 2254, requires persons in state custody seeking federal habeas relief to first exhaust available state remedies. *See* 28 U.S.C. § 2254. Section 2254 provides for exhaustion of state remedies, and exceptions to the exhaustion requirement, as follows:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process

ineffective to protect the rights of the applicant.

Id. § 2254(b). Thus, "[a] state prisoner wishing to raise claims in a federal petition for habeas corpus ordinarily must first present those claims to the state court and must exhaust state remedies." *Weeks v. Bowersox*, 119 F.3d 1342, 1349 (8th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1093, 118 S. Ct. 887, 139 L. Ed. 2d 874 (1998); *see O'Sullivan v. Boerckel*, 526 U.S. 838, 842-43, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."). The petitioner has "the burden to show that all available state remedies ha[ve] been exhausted or that exceptional circumstances existed" making exhaustion unnecessary. *See Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998); *accord Gentry v. Lansdown*, 175 F.3d 1082, 1083 (8th Cir. 1999) ("To satisfy the exhaustion requirement, [the petitioner] must show that he either made a fair presentation of his claims to the state courts or that he has no other presently available state remedies to pursue."). The exhaustion requirement "is based on the principle that 'as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act.'" *Wayne v. Missouri Bd. of Probation and Parole*, 83 F.3d 994, (8th Cir. 1996) (quoting *Rose v. Lundy*, 455 U.S. 509, 515, 102 S. Ct. 1198, 1201, 71 L. Ed. 2d 379 (1982)); *see also Williams v. Taylor*, 529 U.S. 420, 437, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) ("'Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review his claim and provide any necessary relief.'") (quoting *O'Sullivan*, 526 U.S. at 844); *Padavich*, 162 F.3d at 522 (noting that the exhaustion rule is "not a rule of jurisdiction, and sometimes the interests of comity and federalism [are] better served by

addressing the merits.") (quoting *Thompson v. Missouri Bd. of Parole*, 929 F.2d 396, 398 (8th Cir. 1991) (internal quotation and citation omitted); *Smith v. Wolff*, 506 F.2d 556, 558 (8th Cir. 1974) ("[T]he exhaustion of state remedies doctrine is a rule of comity and not a rule limiting the power of federal courts to give habeas relief.").

"Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice.'" *Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (citing *Murray v. Carrier*, 477 U.S. 478, 485, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) and *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)). The Eighth Circuit Court of Appeals, in *Smittie v. Lockhart*, 843 F.2d 295, 296-97 (8th Cir. 1988), employed a four-step analysis in determining whether a claim that had not been presented to a state court could be considered:

> (1) determination of whether the petitioner "fairly presented" the federal constitutional claim to the state courts; (2) if not, determination of whether the exhaustion requirement has nonetheless been met "because there are no 'currently available, non-futile state remedies' through which the petitioner can present his claim"; (3) if there is no currently available state remedy, determination of "whether the petitioner has demonstrated 'adequate cause to excuse his failure to raise the claim in state court properly'"; and (4) if the petitioner satisfies the "cause" requirement, determination of "whether he has shown 'actual prejudice to his defense resulting from the state court's failure to address the merits of the claim.'"

Hughes v. Lund, 152 F. Supp. 2d 1178, 1181 (N.D. Iowa 2001) (quoting *Smittie*, 843 F.2d at 296).

In *Padavich v. Thalacker*, 162 F.3d 521 (8th Cir. 1998), *cert. denied*, 527 U.S.

1025, 119 S. Ct. 2374, 144 L. Ed. 2d 778 (1999), the Eighth Circuit Court of Appeals discussed the 'futility' of exhausting state remedies in the face of contrary state authority, observing:

> We have recognized the futility of requiring a habeas petitioner to exhaust state remedies when the state court has recently decided the same legal question adversely to the petitioner under nearly identical facts. *See Hawkins v. Higgins*, 898 F.2d 1365, 1367 (8th Cir. 1990); *Piercy v. Black*, 801 F.2d 1075, 1077-78 (8th Cir. 1986). Nevertheless, the State reminds us of the United States Supreme Court's admonishment that a defendant may not fail to raise a constitutional objection in "the state courts simply because [the defendant] thinks [the state courts] will be unsympathetic to the claim." *Engle v. Isaac*, 456 U.S. 107, 130, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). As the Supreme Court pointed out, "[e]ven a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid." *Id.*

Id. at 522. Although the Eighth Circuit "acknowledge[d] the possible inconsistency between this Court's holdings in *Hawkins* and *Piercy* and the Supreme Court's statement in *Engle*," the court found that it could "leave this issue for another day," because it was appropriate to rule on the merits of the habeas corpus claim then before it, not least because the claim was "non-meritorious." *Id.* Therefore, "[a] federal court will not hear a claim if the petitioner has not exhausted all available state remedies unless further litigation in the state courts would be futile . . . ." *Sloan v. Delo*, 54 F.3d 1371, 1378 (N.D. Iowa 1995) (citing 28 U.S.C. § 2254(b)); *see Duvall v. Purkett*, 15 F.3d 745, 746 (8th Cir. 1994) ("A petitioner . . . who has not sought state post-conviction relief should be required to do so before pursuing federal habeas relief unless he has 'no available, nonfutile state remedies' . . . .") (quoting *Daniels v. Jones*, 944 F.2d 429, 430 (8th Cir. 1991); *see also Murray v. Wood*, 107 F.3d 629, 631 (8th Cir. 1997) (citing *Duvall* for

same principle). An argument that pursuit of state court remedies is futile is, in essence, a claim that "circumstances exist that render such process ineffective to protect" the habeas petitioner's rights. *See* 28 U.S.C. § 2254(b)(1)(B)(ii); *Doty v. Lund*, 78 F. Supp. 2d 898, 901-03 (N.D. Iowa 1999).

E. Analysis

It is clear from the record that Laffey *did* raise an Eighth Amendment claim on direct appeal of his original sentences, and *did not* raise an Eighth Amendment claim on direct appeal of his sentences following resentencing. Starting from this premise, it appears that Ault's objections are premised on two basic arguments: (1) the futility doctrine is not viable 'cause' to excuse failure to exhaust a claim post-AEDPA; and (2) even if the futility doctrine remains viable, the Iowa Supreme Court's discussion of the Eighth Amendment claim in *Laffey I*, was merely dicta and therefore cannot be a basis for establishing the futility of asserting an Eighth Amendment argument on direct review of Laffey's new sentence upon resentencing. The court will address each of these basic arguments in turn.

Ault first argues that the futility exception to the exhaustion requirement recognized by the Eighth Circuit pre-AEDPA, did not survive the enactment of the AEDPA (effective April 24, 1996) and therefore cannot be a basis for excusing Laffey's failure to exhaust his Eighth Amendment claim as to his sentences following remand. While the court finds Ault's argument interesting, the court does not, and in fact due to applicable precedent cannot, find it persuasive. Though the AEDPA amendments changed a number of aspects of habeas law, the AEDPA amendments to subsection (b) of Section 2254 simply changed the format, but not the content, of the provision. *See* 28 U.S.C. § 2254(b) (1994). Thus, the exhaustion requirements and exceptions to it were stated in the same language used in

the pre-AEDPA version of the statute—therefore, it follows, that exceptions recognized prior to the AEDPA's 'reorganization' of subsection (b) would likewise be recognized after the amendments. *See Doty*, 78 F. Supp. 2d at 901 n.2. Further, the Eighth Circuit has clearly recognized the continued viability of the futility doctrine post-AEDPA:

> We have held, *post-AEDPA*, that "a district court has no authority to hold a habeas petition containing unexhausted claims in abeyance absent truly exceptional circumstances, such as when state remedies are inadequate or fail to afford a full and fair adjudication of federal claims, *or when exhaustion in state court would be futile*." *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (citing *Victor v. Hopkins*, 90 F.3d 276, 278-80 & n.2, 282 (8th Cir. 1996), *cert. denied*, 519 U.S. 1153, 117 S. Ct. 1091, 137 l. Ed. 2d 224 (1997)).

Akins v. Kenney, 341 F.3d 681, 686 (8th Cir. 2003) (emphasis added). Therefore, though the Eighth Circuit in *Padavich* side-stepped a *possible* inconsistency between its prior decisions in *Hawkins* and *Piercy* and the Supreme Court's admonishment in *Engle* that exhaustion cannot be excused merely because the petitioner "thinks [the state courts] will be unsympathetic to the claim,"*Padavich*, 162 F.3d at 522 (quoting *Engle*, 456 U.S. at 120), it has continued to include futility as a basis under which to excuse failure to exhaust. It is not this court's place to hold to the contrary. *See Xiong v. State*, 195 F.3d 424, 426 (8th Cir. 1999) ("The district court had no power to replace governing circuit law with its own view."). Therefore, this court, like the Eighth Circuit, must recognize "the futility of requiring a habeas petitioner to exhaust state remedies when the state court has recently decided the same legal question adversely to the petitioner under nearly identical facts" as excusing failure to exhaust state court remedies under Section 2254(b). *Padavich*, 162 F.3d at 522 (citing *Hawkins*, 898 F.2d at 1367 and *Piercy*, 801 F.2d at 1077-78); *see Murray v. Wood*, 107 F.3d 629, 631 (8th Cir. 1997) ("A petitioner who has not availed

himself of a state's post-conviction procedure should be required to do so unless he has no *available nonfutile* remedies.")

The court finds Ault's second objection equally as unavailing as the first. Having found futility is a basis for excusing failure to exhaust, Ault would now have this court hold that because the Iowa Supreme Court, in *Laffey I*, vacated and remanded the matter for resentencing based on the court's use of an improper sentencing factor, and not on Laffey's Eighth Amendment argument, that the Iowa Supreme Court's discussion of Laffey's Eighth Amendment claim is essentially not an adverse "decision [of] the same legal question . . . under nearly identical facts." *Padavich*, 162 F.3d at 522. As stated above, Laffey raised four claims on the direct appeal of his original sentence: (1) the evidence was insufficient to support the guilty verdict; (2) ineffective assistance of counsel; (3) his two consecutive 25-year sentences constituted cruel and unusual punishment under the Eighth Amendment; and (4) the trial court abused its discretion by considering an improper sentencing factor in sentencing. *Laffey I*, 600 N.W.2d at 58. The Iowa Supreme Court addressed each of these claims in the order set forth above; specifically stating the following with regard to the Eighth Amendment claim:

> The defendant claims that the court's decision to make this sentences run concurrently violates the Eighth Amendment's prohibition of cruel and unusual punishment. *See* U.S. Const. amend. VIII. He points out that he will have to serve forty-two and one-half years before he can be released. *See* IOWA CODE §§ 902.12, 903A.2 (1997). Because he will be eighty years old by then, he characterizes his punishment as a lifetime sentence. Laffey also argues that his punishment is significantly more severe than that imposed for other, more grievous, crimes of sexual abuse. We review this constitutional claim de novo. *See State v. Hunter*, 550 N.W.2d 460, 462 (Iowa 1996).

We recently considered a similar claim in *State v. August*, 589 N.W.2d 740 (Iowa 1999). In that case, the defendant was also sentenced to two consecutive, twenty-five year terms of incarceration. *August*, 589 N.W.2d at 741. In deciding whether these sentences violated the Eighth Amendment, we compared the sentences with the gravity of the defendant's crimes, viewed objectively. *Id.* at 743. We held that only if such an examination allows an inference of gross disproportionality, would the court engage in a detailed consideration of the proportionality of the offense to the sentence, including a comparison of the punishment for this crime with the sentences imposed on other criminals. *Id.* at 742-43 (referring to three-factor test set out in *Solem v. Helm*, 463 U.S. 277, 292, 103 S. Ct. 3001, 3011, 77 L. Ed. 2d 637, 650 (1983)).

In *August*, we held that a twenty-five-year term of imprisonment for second-degree kidnaping, to be served consecutively to a twenty-five-year term for first-degree robbery, did not violate the Eighth Amendment. *Id.* at 744. We stated that "[t]here is nothing cruel and unusual about punishing a person committing *two* crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing." *Id.*

The same result is mandated here. Laffey committed two serious crimes—the sexual abuse of two young children. That severe and lasting emotional harm can result to these helpless victims makes the crime especially egregious and deserving of a severe punishment. Therefore, we conclude Laffey's consecutive sentences do not give rise to an inference of gross disproportionality. The fact that these sentences may mean that Laffey serves the remainder of his life in prison is not a factor in our analysis. *See id.* at 743-44 (rejecting the defendant's request that an individualized assessment of the severity of the punishment be made). In addition, this

> conclusion makes it unnecessary to evaluate the severity of Laffey's sentence as compared to the sentences imposed on other criminals in this state. *See id.* at 742 (holding that *Solem* factors are considered only when the initial examination of the crime and punishment gives rise to an inference of gross disproportionality).

Id. at 61-62. The court does not read this discussion to be dicta, but, rather, as the Iowa Supreme Court's disposition of Laffey's Eighth Amendment argument. Both the State and Laffey certaintly treated it as a disposition of the Eighth Amendment claim at resentencing. At Laffey's resentencing Mr. Philip Tabor, for the State, invoked the Eighth Amendment analysis employed in *Laffey I*, in recommending that Laffey receive two consecutive 25-year sentences:

> I believe that *the Supreme Court in its opinion said* that there is nothing cruel and unusual about punishing a person committing two crimes more severely than a person committing only one crime and that in this case Mr. Laffey committed two serious crimes of sexual abuse of two young children with severe and lasting results to these two young children which makes the crime worthy of this punishment.

State v. Laffey, Case No. FECR 003529, Transcript of Sentencing Proceedings, at p. 3:2-9 (Iowa Dist. Ct. for Jackson County May 9, 2000) (emphasis added). At resentencing Laffey's counsel likewise noted: "I assume you're not in the mood *to overrule the Supreme Court*, but I will persist in the Eighth Amendment claims." *Id.* at 3:12-14 (emphasis added). Just because the original sentence was vacated for consideration of an improper sentencing factor does not mean that all of the other holdings as to Laffey's claims of error were therefore obliviated into dicta. *See Union Pacific Railroad Co. v. Mason City & Ft. Dodge Railroad Co.*, 199 U.S. 160, 166, 26 S. Ct. 19, 50 L. Ed. 134 (1905) ("It cannot be said that a case is not authority on one point because, although that point was properly

presented and decided in the regular course of the consideration of the case, something else was found in the end which disposed of the whole matter."); *but see Jama v. Immigration and Customs Enforcement*, ___ U.S. ___, 125 S. Ct. 694, 706 n.12, ___ L. Ed. 2d ___ (2005) ("Dictum settles nothing, even in the court that utters it."). Under this backdrop, the court cannot say that the Iowa Supreme Court's finding that Laffey's original consecutive 25-year sentences did not give rise to an inference of gross disproportionality in violation of the Eighth Amendment amounted to only dictum and not a decision of the court as to that legal question.

It is settled that the "exhaustion requirement was not meant . . . to provide the state with more than one full and fair opportunity to decide a question which is properly presented to it for review." *Eaton v. Wyrick*, 528 F.2d 477, 480 (8th Cir. 1975) (citing *Wildwording v. Swenson*, 404 U.S. 249, 250, 92 S. Ct. 407,30 L. Ed. 2d 418 (1971) and *Irby v. Missouri*, 502 F.2d 1096, 1098 (8th Cir. 1974)). Nor must the state court even rule on the merits of a claim for the exhaustion requirement to be satisfied: "A petitioner meets the fair presentation requirement if the state court rules on the merits of his claims, or if he presents his claims in a manner that entitles him to a ruling on the merits." *Gentry*, 175 F.3d at 1083 (citing *Castille v. Peoples*, 489 U.S. 346, 351, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989)). The futility doctrine takes this to the next logical step in that a habeas petitioner is excused from exhausting state remedies "when the state court has recently decided the same legal question adversely to the petitioner under nearly identical facts." *Padavich*, 162 F.3d at 522. In fact, most habeas petitioners asserting the futility doctrine contend that raising a particular claim would be futile in light of an adverse holding in a factually similar case raising the same legal question. *See Hawkins*, 898 F.2d at 1367 (finding petitioner's state court remedies futile and any state court challenge a waste of judicial resources where the Missouri Supreme Court had decided same legal issue

adversely in case with nearly identical underlying facts); *Piercy*, 801 F.2d at 1077-78 (finding, as to petitioner's third claim for relief, that "recourse to the Nebraska courts would be futile in light of the Nebraska Supreme Court's ruling" on the same legal issue under almost identical facts); *but see Doty*, 78 F. Supp. 2d at 902 (finding that existence of state authority contrary to petitioner's position did not render Iowa's post-conviction relief process ineffective and refusing to excuse failure to exhaust claim under futility analysis). In this case, Laffey's new sentences following remand mirrored his original sentences therefore any Eighth Amendment claim as to the new sentences would raise the *same legal question* already raised on direct review in *Laffey I*. Further, save the omission from consideration of an impermissible sentencing factor at resentencing, the facts surrounding the imposition of both the original and the new sentences were *identical*. This is a textbook situation in which application of the futility doctrine is appropriate to excuse Laffey's failure to assert the Eighth Amendment claim on direct review following resentencing. Asserting an Eighth Amendment claim on direct review following resentencing "would [have been] futile, and a waste of judicial resources." *Hawkins*, 898 F.2d at 1367.

III. CONCLUSION

For the reasons set forth above, the court **overrules** Ault's objections and **adopts** Judge Zoss's Report and Recommendation. Ault's Motion To Dismiss is **denied**. (Doc. No. 17).

IT IS SO ORDERED.

DATED this 28th day of March, 2005.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA